

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

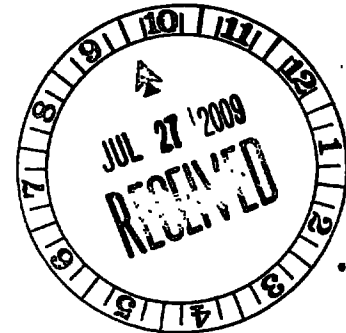
25 Louisiana Avenue, NW
Washington, DC 20001



C. THOMAS KEEGEL
General Secretary-Treasurer

202.624.6800
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July 24, 2009



VIA NEXT DAY AIR

Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: STB Docket No. MC-F-21034

225409

Dear Sir/Madam:

Enclosed please find the original and (10) ten copies of Comments by the International Brotherhood of Teamsters (IBT) regarding STB Docket No. MC-F-21034. A copy has been served on Mr. Taylor and Mr. Calderwood.

Thank you for your time and attention to this matter. Please call if there are any questions.

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Enclosure

cc: William Taylor, Esq
James Calderwood, Esq.

Sincerely,

A handwritten signature in cursive script, reading "Michael T. Manley".

Michael T. Manley

COMMENTS OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Before the
UNITED STATES DEPARTMENT OF TRANSPORTATION
Surface Transportation Board

STB Docket No. MC-F-21034

July 24, 2009



These comments are submitted on behalf of the International Brotherhood of Teamsters (IBT), its more than 420 affiliated Local Unions, and its more than 1.3 million members.

The IBT already represents some of the truck drivers engaged in hauling containers to and from the Ports of Los Angeles and Long Beach, California (San Pedro Bay Ports) and is actively involved in efforts to organize others. These organizational activities include an effort to organize drivers working for Southern Counties Express, Inc. (SCE), one of the carriers party to the joint venture operating agreement that is the subject of these comments.

Both employee and independent contractor drivers operate in a chaotic, fragmented market, made up of small motor carriers. It has been estimated that 1,300 motor carriers provide drayage services in the two ports, utilizing approximately 17,000 drivers.¹ A few of these motor carriers, such as Southern Counties utilize employee drivers, at least in part, to conduct their business. Most of the other drivers operating in the San Pedro Bay Ports are currently classified as independent contractors.

Motor carriers providing drayage services typically do so utilizing equipment leased from the drivers who work for them. Typically, though not always, such equipment leases are made with drivers working as independent contractors. That is, the individuals driving for the motor carrier are typically driving their own truck. The fee that the driver receives represents payment for driving services rendered in transporting the container and an equipment rental

¹ These figures are drawn from the complaint filed in *Federal Maritime Commission v. City of Los Angeles*, ___ F. Supp.2d (DC 2009), 2009 U.S. Dist LEXIS 32403, Case No. 08-1895. The applicants put the number of carriers at 1,200. *Application*, page 15.

payment, representing the driver's return on the driver's capital investment in his or her truck.

The nature of the drayage market is such that drivers have almost no economic power to negotiate or set rates. The motor carriers actually function as brokers, matching independent drivers with loads from shippers and shipping lines. Rates are presented to drivers on a take-it-or-leave-it basis. Because they are primarily classified as independent contractors, it is unlawful for port drivers to combine and "pool" their resources, as the applicants seek to do here, without violating the Sherman Anti-Trust Act.

As a result, both employee and independent contractor drivers are unable to make a decent living, despite the fact that drivers typically work 11 to 12 hour days.

The pooling arrangement proposed by the applicants will have a disastrous impact on drivers operating in the San Pedro Bay Ports. Granting the CTC's application means that the ten companies involved will be able to coordinate and set prices both for what they charge and what they pay for services. This will harm competition overall, but will be particularly devastating for drivers who lease their equipment.

It is important to note in this regard that, while the application talks about pooling the CTC members stock of "green" trucks, there are no practical limits on the topics on which the CTC members may collude. The application's stated intent to "cross-sell and promote each other's *services*, to leverage clean truck equipment utilization, with or without drivers . . ." *Application*, page 11 (emphasis added).

Even more telling is the Section 14.1 of the Operating Agreement, attached as Appendix 1 to the Application. The last sentence of Section 14.1 states:

"To the extent that any Member utilizes contracted owner operators/independent contractors, the Members will arrange through appropriate subleases or other forms of leases to make such equipment available to another Member."

Application, Exhibit 1, page 21

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This is a description of a price-fixing arrangement with regard to the services of owner-operators.

The applicants approach this question by emphasizing that they “collectively represent less than ten percent (10%) of the overall monthly truck activity to and from Long Beach and Los Angeles harbor facilities”, *Application*, page 4, and that therefore there is no concern about undue control of the market. This approach is disingenuous for two reasons.

First, as a result of the Clean Air Action Plan, both Ports have adopted a “Clean Trucks Program”, which imposes a progressive ban on dirty trucks. One of the by-products of this program is that the Ports now collect data regarding the number of moves performed and market share maintained by motor carriers involved in the CTP. The first compilation of such data was released by the Port of Los Angeles in June 2009. Exhibit A sets forth data drawn from this compilation. This data strongly suggests that the collective market share of the ten companies forming the CTC exceeds ten percent. Just five of the ten carriers involved accounted for eight percent (8%) of market share measured by all container moves at the Port. More importantly, those same five carriers account for twelve percent (12%) of all moves carried out by “clean trucks”. This suggests that the CTC is strongly positioned to dominate the market as the port policies push customers to use newer, cleaner trucks.

The second reason to be suspicious of the applicant’s ten percent claim is that if they are successful, as they anticipate, then their market share will necessarily grow. Hence, the baseline estimate of “less than ten percent” market share is not the appropriate metric. The question is what do the applicant’s estimate their market share to be once the pooling application to be granted?

Part of the answer is provided by the applicants themselves. They indicate that they “are willing to consider... additional participants.” *Application*, page 16. This ten company agreement is therefore simply the camel’s nose under the tent. Over time, more companies will enter the CTC, producing a cartel that will dominate and restrain competition for port drayage at the San Pedro Bay Ports.

An agreement such as the one being proposed here is particularly dangerous to competition in light of the fact that the drayage market at the San Pedro Bay Ports is in flux right now, and is expected to continue to shift through the transition period (ending in 2012). As the application itself outlines, through their respective “Clean Trucks Program, both Ports have imposed a progressive ban on the use of older, “dirty” diesel trucks. Ultimately, by 2012, all trucks running in both Ports

will need to utilize either Model Year 2007 or newer diesel or alternative fueled (liquid natural gas or electric) engines.

Several significant elements of the two Ports' Clean Truck Programs have been enjoined in federal District Court, but the bans and a subsidy system remain in place. The ban and subsidy are likely to cause a significant shift in the market, most likely resulting in a market consolidation. Indeed, this is already taking place. For example, while estimates of the number of carriers operating in the San Pedro Bay Ports as of September 2008 were in the range of 1200 carriers, only approximately 800 were approved to participate in the Clean Trucks Programs.

What assurance is there that as the market continues to change that the CTC will not unreasonably restrain competition? The answer is 'none'. In fact, the evidence suggests that the effect of granting the application will be to put the CTC in position to dominate the market.

The anti-competitive effect of the agreement is enhanced by the fact that the ambiguous structure and operating procedure described for the CTC (outlined below) allows the member companies unprecedented access to data regarding each company's operations.

The applicants will doubtless respond to these comments by pointing out that only "clean" trucks are subject to the pooling arrangement and that each applicant will continue to operate regular "non-clean" diesel tractors. The problem with this argument is that, as the application itself admits, the Clean Air Action Plans, enacted by both Ports, call for the ultimate "[r]eplacement of 'dirty' trucks with a new generation of clean or retrofitted vehicles." *Application*, page 4. *See also, Application* at page 6. As the Clean Air Action Plans progress at the two ports, motor carriers such as the ten involved in this application will be expected to replace their existing fleets with clean trucks. Indeed, by 2012, all trucks operating in the Ports must be "clean" trucks. As a result, within a fairly short period of time, all of the trucks operated by the ten applicants will fall into the pooling arrangement.²

² The applicants assert the ability of better-heeled competitors to buy more clean trucks as a reason why the application should be granted. *Application*, page 15.

The nature and operation of the Clean Truck Coalition (CTC) is unclear. Will the CTC merely be a repository for equipment that will be made available to the ten member companies? Or will the CTC become a drayage provider itself?

If the CTC is to be a drayage provider, then it will need to become a licensed motor carrier. In this case, the CTC will be directly “competing” with its own owners. Given the structure of the CTC, however, such “competition” will be an illusion. Instead, the CTC will simply be a vehicle to allow the participants to collude with one another to set prices and engage in other anti-competitive conduct. But, even if the CTC is not going to be a licensed motor carrier, it will still have an anticompetitive effect through the coordinated purchase, maintenance, leasing and operation of clean trucks.

The application raises as many questions as it answers. For example, the applicants state that “they would welcome the opportunity to augment their fleets with additional clean trucks, but are currently financially unable to do so.” If the financial situation of the applicants does not allow for investment in such assets now, then how will the CTC be able to continue as a viable entity? The only logical answer is that the coordination of purchasing and the “cross selling” alluded to in the application will reduce the applicant’s costs such that they will become more profitable and be able to purchase more clean trucks. The problem with this scenario is that the applicants are proposing to achieve these efficiencies by engaging in collusive practices, particularly with regard to their relationship with drivers.

The description of control and authority within the CTC is completely ambiguous. The operating agreement indicates that “the LLC shall have no officers.” How, then, can the CTC be held accountable? In fact, however, it is clear that one applicant, Green Fleet Systems, holds more control than others: the CTC is headquartered at the offices for Green Fleet, and the attorney for Green Fleet “undertook to form the LLC and to draft [the operating] agreement.” This relationship should be clarified and explained.

Are all applicants in full compliance with all rules and regulations established by the Federal Motor Carrier Safety Administration? At least one applicant (Southern Counties Express) claims on its website that it has common carrier authority, yet Appendix 1 of the application indicates that SCE’s common carrier authority is inactive.

In summary, granting this application would harm competition for drayage services in the San Pedro Bay Ports. It would be particularly damaging to the drivers struggling to make a living by moving cargo out of the Ports and into the stream of national commerce. For this reason, the IBT requests that the application be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael T. Manley", written in black ink. The signature is fluid and stylized, with a horizontal line drawn beneath the name.

Michael T. Manley

Counsel to Teamsters Port Division
International Brotherhood of Teamsters
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<u>Company</u>	<u>Total Mov</u>	<u>Clean Truck Moves</u>	<u>Clean Truck Move %</u>	<u>Truck Fleet</u>	<u>Clean Trucks</u>	<u>Clean Truck %</u>
California Multimodal	9,487	8536	89.98%	602	176	0.292359
Container Freight EIT LLC	6,534	6278	96.08%	266	136	0.511278
HUDD Transportation	5,986	5009	83.68%	372	143	0.384409
Pacific Nine (9) Transportation Inc.	5,126	4639	90.50%	276	111	0.402174
K&R Transportation LLC	3,983	3715	93.27%	191	116	0.60733
Fargo Trucking Company Inc.	3,571	3411	95.52%	169	85	0.502959
Tradelink Transport Inc.	3,315	3033	91.49%	60	34	0.566667
Land Truck Inc.	2,783	1954	70.21%	126	20	0.15873
Overseas Freight Inc.	2,529	1550	61.29%	102	33	0.323529
Total Transportation Services Inc.	2,526	2526	100.00%	109	107	0.981651
Sterling Express Services Inc.	2,510		0.00%	101		0
Western Freight Carrier	2,504	1937	77.36%	189	50	0.26455
Lincoln Transportation Services	2,483	2186	88.04%	167	63	0.377246
Harbor Express Inc.	2,314	1556	67.24%	271	29	0.107011
Sea-Logix LLC	2,232	2232	100.00%	104	60	0.576923
Swift Transportation Company Inc.	2,185	2185	100.00%	724	724	1
Fox Transportation Inc.	2,164	2091	96.63%	127	62	0.488189
Harbor Rail Transport	2,129	2019	94.83%	253	123	0.486166
Knight Transportation Inc.	1,939	1939	100.00%	188	188	1
Green Fleet Systems LLC	1,840	1766	95.98%	78	50	0.641026
Container Connection of Southern California		1287	#DIV/0!		89	#DIV/0!
Top 20	68,140	59,849	87.83%	4,475	2,399	53.61%
Port wide	177,920	104,123	58.52%	19,293	5,045	26.15%
		#DIV/0!				
Top 20 density	38.30%	57.48%		23.19%	47.55%	

Exhibit A